

**THE DYNAMICS IN THE RECOGNITION OF CUSTOMARY JUSTICE  
IN THE POLITICS OF LAW OF THE JUDICIARY IN INDONESIA**

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I KETUT SUDANTRA, I NYOMAN NURJAYA, A. MUKTHIE FADJAR, ISROK

[sudantra01@yahoo.co.id](mailto:sudantra01@yahoo.co.id)

**DOCTORAL PROGRAM OF LEGAL STUDIES, FACULTY OF LAW  
UNIVERSITY OF BRAWIJAYA  
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# THE DYNAMICS IN THE RECOGNITION OF CUSTOMARY JUSTICE IN THE POLITICS OF LAW OF THE JUDICIARY IN INDONESIA

Authors:

**I Ketut Sudantra<sup>1</sup>, I Nyoman Nurjaya<sup>2</sup>, A. Mukthie Fadjar<sup>3</sup>, Isrok<sup>4</sup>**

Doctoral Program of Legal Studies, Faculty of Law, University of Brawijaya  
Malang

Email: sudantra01@yahoo.co.id

## ABSTRACT

This study aims at discussing the dynamics of the legal recognition of customary justice in politics of law of the judicial power in Indonesia. In accordance with the nature of the analysis, namely, the normative legal analysis, the approach used in this study is the statute approach completed with historical and futuristic approach of the law. The study results show that the recognition of customary justice in the politics of law in Indonesia has been dynamic along with the change of government. In the colonial time of the Dutch East Indies government, there were two forms of customary justice formally recognized, namely, the indigenous justice ( *inheemsche rechtspraak* ) and the village justice ( *dorpjustitie* ). These conditions remained prevailing at the time of the Japanese occupation and in the early days of Indonesian independence. In 1951, the existence of customary courts were abolished gradually and brought an end in 1970 in which the existence of the formal justice system of out-of-the state court- settlement was not allowed anymore. The customary courts abolished in 1951 were indigenous justice ( *inheemsche rechtspraak* ) while the existence of village justice ( *dorpjustitie* ) continued to be recognized. In the Judicial Power Act of 2009 applied at present, there is no provision which gives recognition of customary justice, but in the laws governing special autonomy for Papua Province - a province in eastern Indonesia - the existence of customary court is explicitly recognized . From the program of national legislation in the House of Representatives of the Republic of Indonesia, it is known that in the future it seems customary justice will be recognized nationally by legislation governing the unity of customary law society

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<sup>1</sup> Student of Legal Science Doctoral Program of Law Faculty of Brawijaya University, Malang.

<sup>2</sup> Professor of Law Faculty of Brawijaya University, Malang

<sup>3</sup> Professor of Law of Brawijaya University, Malang, and Former Judge of Constitutional Court of Indonesian Republic

<sup>4</sup> Professor of Law Faculty of Brawijaya University, Malang

## INTRODUCTION

In the second amendment to the Constitution of the Republic of Indonesia Year 1945 (hereinafter referred to as: the 1945 Constitution) that occurred in 2000, it was included Article 18B Paragraph (2) and Article 28 paragraph (3) which basically states: firstly, recognize and respect the existence of the unity of customary law society and their traditional rights; secondly, respecting the cultural identities and the rights of traditional communities as part of human rights that must be protected, promoted, enforced, and fulfilled by the state, especially by the government. Recognition and respect for the rights of the unity of customary law society in the 1945 Constitution can be interpreted both philosophically and judicially. Philosophically, the recognition and respect given by the state is a tribute to the values of humanity and human rights. Judicially, these provisions provide the constitutional

basis for the direction of the law politics in recognition of traditional rights of the unity of customary law society

Although there is no authentic explanation of the limits and scope of the definition of "traditional rights" of the unity of customary law society referred by the 1945 Constitution, but it can be traced from the literature of customary law that one of the traditional rights of both the cultural identity of the universal unity of customary law society and a prerequisite for the existence of the unity of customary law society is the right to autonomy <sup>5</sup>, namely the right of the unity of customary law society to take care of their own domestic affairs. According to Van Vollenhoven, the scope of autonomy itself covers activities to draw up their own regulation (*zelfwetgeving*), to implement their own regulation (*zelfffluitvoering*), to

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<sup>5</sup> Zen Zanibar. "Masyarakat Hukum Adat". In the appendix of the limited Discussion Report *Kedudukan Hukum Kesatuan Masyarakat Hukum Adat dan Keterkaitannya dengan Pemekaran Wilayah*. (Jakarta: Mahkamah Konstitusi Republik Indonesia. 3 Juni 2008), page 7.

have their own court of justice (*zelfrechtspraak*), and to perform their own police duties (*zelf-Politie*)<sup>6</sup>. As a result, the right of autonomy owned by the unity of customary law society in Indonesia also includes the judicial functions, the power of the unity of customary law society to solve their own legal problems that occur within their region, be it in the form of disputes or violations of law.

Theoretically, with the inclusion of Article 18B Paragraph (2) and Article 28 paragraph (3) of the 1945 Constitution, the recognition and respect for the traditional rights of the unity of customary law society should be embodied in legislation under the Constitution, which is in the level of act or regulation. In accordance with the theory of the hierarchy of norms<sup>7</sup>, the regulation must not

regulate anything that is in conflict with the spirit or the principle adopted in the Constitution. With the recognition of the 1945 Constitution towards the traditional rights of the unity of customary law society (including the prosecuting authority), the regulation should also recognize the existence of customary justice. What is meant here by "Recognition" is the formal approval to an entity (in this case the customary justice) that has a special status<sup>8</sup>.

The possibility to accommodate the customary justice in the justice system in Indonesia is also implied by Article 24 paragraph (3) of the 1945 Constitution which states that other institutions in which their functions related to the judicial power are regulated in the

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<sup>6</sup> Panitia Ad Hoc I DPD RI. "Naskah Akademik Rancangan Undang-undang tentang Perlindungan Masyarakat Adat". Materi Uji Sahih. (Dewan Perwakilan Daerah Republik Indonesia, Juni 2009), page 50.

<sup>7</sup> According to Hans Kelsen, the legal system is a hierarchy of norms that have a different level. The unity of the norms were arranged in a hierarchical manner in which the

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validity of the lower norm is determined by a higher norm. Basic norm is the highest level in the national law. See: Jimly Assiddiqie-Ali Safa'at, *Teori Hans Kelsen tentang Hukum*, (Jakarta: Sekretariat Jendral dan Kepanitraan Mahkamah Konstitusi Republik Indonesia, 2006), page 109.

<sup>8</sup> Gede Marhaendra Wija Atmaja, "Politik Hukum dalam Pengakuan Kesatuan masyarakat Hukum Adat dengan peraturan Daerah", *Dissertation*, (Malang: Program Doktor Ilmu Hukum Universitas Brawijaya, 2012), hlm. 98.

legislation"<sup>9</sup>. The option to recognize or not to recognize the customary justice in the state's legal system is a domain of politics of law, especially politics of law of judicial power because the judicial administration is one of the functions of the judicial power. Policy of law as the official policy of the applicable laws is strongly influenced by the political configuration of the powerful rulers of a country<sup>10</sup>. The Policies of the state's rulers are set forth in the product of law/legal product, in which the guidelines were outlined in the constitution and further elaborated in the lower legal products, especially in a legal products at the level of legislation. Along with the alternation of governments who hold the reins of state power in Indonesia, legislation governing the judiciary has been already changed several times.

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<sup>9</sup> Anonim, *Sistem Peradilan Adat dan Lokal di Indonesia, Peluang & Tantangan*, (Jakarta: Aliansi Masyarakat Adat Nusantara (AMAN)-Partnership for Governance Reform, 2003), page 50.

<sup>10</sup> Moh. Mahfud MD., *Politik Hukum di Indonesia*, Edisi Revisi, (Jakarta: Rajawali Pers, 2009), page 1, 4.

Since the 1945 Constitution was amended, the statute of the judiciary had been changed twice, which were in 2004 and 2009. Therefore, it is interesting and relevant to examine the dynamics of judicial recognition of customary justice in the politics of law of judiciary. This study becomes more relevant because customary justice actually is a sociological fact, where customary justice is still alive and practiced within its thousands of the unity of customary law society scattered in the territory of the Republic of Indonesia<sup>11</sup>. It is very important to study the dynamics of the politics of law of the judiciary from time to time in response to this social reality.

Based on this background, the study analyzes the dynamics of judicial recognition of customary law in the politics of judiciary in Indonesia since the pre-independence to the present time. The study was conducted by observing the ever applied and the

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<sup>11</sup> Hedar Laujeng, *Mempertimbangkan Peradilan Adat*, (HuMa, 2003), page 12.

current applicable laws (*ius constitutum*) and afterwards the study tries to predict the direction of politics of law in recognition of customary law in the future (*ius constituendum*). Definitely, prior to the study of the dynamics of judicial recognition of customary law in the politics of law of judiciary, it must first discuss the essence of customary justice, particularly in relation to the concept of customary justice adopted in this study.

## METHODOLOGY

This study involves a review of the legal norms. Therefore, it can be grouped into types of normative legal research<sup>12</sup>. In accordance with the normative nature of the study, the main approach used in this study is the statute approach. The statute approach is used to determine the consistency and compatibility between a law with other laws or the laws with the

constitution<sup>13</sup>. In addition, this study also used a historical approach, which is used to trace the dynamics of legal recognition of customary justice in the development of politics of law of the judiciary. By the historical approach, it is expected to be able to reveal the philosophies and point of view behind the regulations relating to customary justice<sup>14</sup>. What happened in the past is very influential on the present time. However, people should not be complacent with what happened in the past and are happy with what happened today. Every person must think and look ahead. Therefore, in addition to these two approaches, this study also used the law futuristic approach to predict the direction of the politics of law developments in recognition of customary law in the future. The futuristic approach is applied by reviewing the developing legal ideas, both in scientific activities

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<sup>12</sup> Mukti Fajar dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris*, (Yogyakarta: Pustaka Pelajar, 2010), page 34.

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<sup>13</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Prenada Media, 2005), page 93.

<sup>14</sup> Peter Mahmud Marzuki, *ibid.*, page 94

(discussions, seminars, workshops) and those which have been set forth in a bill.

As a normative legal study, the main materials used in this study are of legal materials including primary and secondary legal materials. The primary legal materials used include the 1945 Constitution of the Republic of Indonesia, Emergency Act Number 1 of 1951 concerning Emergency Measures of Unitary Power Structure and Administrative Civil Courts, the Ever existed and current applicable Acts of the Judiciary, and other relevant legislations. In addition to legislation, this study also used primary legal materials, which sourced from the Order of the Court, namely the Court Order of The Constitutional Court of the Republic of Indonesia. Publications about the law apart from legislation and court orders, whether in the form of relevant textbooks, legal journals, comments on the order of the court, and the legal dictionary, are used as a secondary legal

materials to elucidate the abovementioned primary legal materials. In addition, this study also used relevant non-legal materials as supporting ones, such as the Indonesian language dictionary to make grammatical interpretation of a term<sup>15</sup>. The whole legal and non-legal materials used in this study are fully cited in the attached reference list.

The collection of study materials was conducted through the literature search process, either in the library or over the internet. The materials found in the literature search process were examined their relevance to this study and further recorded with recording techniques of card system. The materials collected further processed by categorization based on the legal issues discussed in this study, then analyzed to find a solution to those legal issues. The method of analysis was done by using interpretation to

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<sup>15</sup> Soerjono Soekanto qualifies non-legal materials into tertiary legal materials. See: Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif, Suatu Tinjauan Singkat*, (Jakarta: CV Rajawali, 1985), page 41.

reach some conclusions. Among several interpretations of the existing techniques, the techniques used in this study are the grammatical, authentic, historical, systematic<sup>16</sup> as well as futuristic interpretations<sup>17</sup>.

## RESULTS AND DISCUSSION

### 1. The Concept of Customary Justice

The term of "customary justice" ("*peradilan adat*") is not a term commonly used by the people in general, including in customary law societies where customary justice exist and develop, it is used to resolve legal issues that occurred. In the unity of customary law society in Indonesia, the term which more commonly used is "the

customary court" or "customary meeting" in the phrases which varied according to the distinctiveness of the local languages<sup>18</sup>.

As a technical legal term, the term "customary justice" was officially used in some legislation. The newest and most explicitly mention the term "customary justice" in its articles is Act Number 21 Year 2001 on Special Autonomy for Papua Province. The term "customary justice" is also mentioned in the explanation of the Act Number 18 Year 2004 on the Plantation where it is mentioned that the customary justice as one of the elements to be an indicator that the unity of customary law society do still exist. Much earlier, the term "customary justice" and "customary courts" were used in the Emergency Act Number 1 of 1951. Although the definitions of the two terms can be distinguished, the "customary justice" involves a process or system, while the "customary

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<sup>16</sup> Yudha Bhakti Ardhiwisastra, *Penafsiran dan Konstruksi Hukum*, (Bandung: Alumni, 2000), page 9-11.

<sup>17</sup> Regarding the futuristic interpretation, see: Shidarta, "Kerangka Berpikir Harmonisasi Peraturan Perundang-undangan dalam Pengelolaan Pesisir", in Patlis Jason M., TH. Purwaka, A. Wiyana, G.H. Perdanahardja (eds), *Menuju Harmonisasi Hukum Sebagai Pilar Pengelolaan Wilayah Pesisir Indonesia*, (Jakarta: Departemen Hukum dan HAM bekerjasama dengan Coastal Resources Management Project II (USAID), 2005), page 67

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<sup>18</sup> See: Anonim, *op.cit.*, page 8.



courts" implies judicial institutions; however, the Emergency Act Number 1 of 1951 does not seem to distinguish between the two terms, since both terms are used similarly regardless of their definitions. In the articles of the Act, the term used is "customary courts", while in the explanation, both the terms of "customary courts" and "customary justice" are used.

Emergency Act Number 1 of 1951 is a law issued by the Government of the Republic of Indonesia to implement unified composition, powers and administrative civilian courts in Indonesia, the restructuring of the judicial legacy of the colonial Dutch East Indies government. This Act abolished the existence of customary justice in the legal system in Indonesia, which was formed in the Dutch colonial era. Thus, to understand the concept of customary justice intended by the Emergency Act of 1951, it is necessary to understand the judicial

system at the era of the Dutch East Indies government.

In the era of the Dutch East Indies Governance, there were five kinds of justice, namely, (a) *Gouvernements-rechtspraak* (Gubernemen Justice), (b) *inheemsche rechtspraak* (Native Courts or Customary Justice), (c) *Zelfbestuur rechtspraak* (Autonomous Region Justice), (d) *Godsdienstige Rechtspraak* (Religion Justice), and (e) *Dorpjustitie* (Village Justice)<sup>19</sup>. Among the five types of courts above, *iheemsche rechtspraak* by several writers - as done by Tresna<sup>20</sup>, Sudikno Mertokusumo<sup>21</sup>, dan H. Irine Muslim<sup>22</sup> - translated it into the terms of "*peradilan adat* /customary justice" or "*pengadilan adat* /

<sup>19</sup>H. Hilman Hadikusuma, *Peradilan Adat di Indonesia*, (Jakarta: CV Miswar, 1989), page 37.

<sup>20</sup> R. Tresna, *Peradilan di Indonesdia Dari Abad Ke Abad*, (Jakarta: Pradnya Paramita, 1978), page 73

<sup>21</sup> Sudikno Mertokusumo, *Sejarah Peradilan dan Perundang-undangannya di Indonesia Sejak 1942 dan Apakah Manfaatnya Bagi Kita bangsa Indonesia*, (Yogyakarta: Universitas Gajahmada, 1970), page 52.

<sup>22</sup> Ny H. Irene A Muslim, 'Peradilan Adat Pada Masyarakat Daya di Kalimantan Barat', Pidato Pengkuhan jabatan Guru Besar Pada Fakultas Hukum Universitas Tanjungpura, (Pontianak: Universitas Tanjungpura, 15 Juni 1991), page 2.

customary courts", while other authors translated the term into "*peradilan asli* /original justice"<sup>23</sup> or "*peradilan pribumi* indigenous/native justice"<sup>24</sup>. Thus, from the historical perspective it can be seen that in fact what is meant by "*peradilan adat* /customary justice" and "*pengadilan adat* /customary courts" by the Emergency Act Number 1 of 1951 is *inheemsche rechtspraak*, which under the laws of the Dutch East Indies is justice reserved for indigenous groups (native Indonesian). Although this "customary justice" adjudicates another based on customary law, but courts remained under the control of *the Resident* (Dutch government officials) who have enormous power, firstly, to appoint judges to indigenous or native courts (customary justice), secondly, entitled to determine the applicable customary law<sup>25</sup>. Besides *inheemsche rechtspraak*,

Indonesian society in colonial time had native courts existed among the indigenous groups called *dorpjustitie* (village courts), a trial conducted by the village judge, performed by the village chief as head of the customary law society. According to Hazairin<sup>26</sup>, the village judge is an organization whose presence in every village of indigenous people is a *conditio sine qua non* in which as a tool of power apparatus of the village as long as it was able to maintain the original form and privileges as an independent socio-economic entity. The power of the village judge is not limited to the reconciling power only, but also includes the power to make a decision of all disputes in all areas of law without distinguishing between the issues in the field of criminal, civil, and public laws.

According to Abdurrahman, there was no principal difference in the two forms of justice for the

<sup>23</sup> Mahadi, *Uraian Singkat tentang Hukum Adat Sejak RR Tahun 1854*, (Bandung: Alumni, 1991), page 30.

<sup>24</sup> Hilman Hadikusuma, *op.cit.*, page 23.

<sup>25</sup> R. Tresna, *op.cit.*, page 73.

<sup>26</sup> Hazairin, "Kata Pengantar (Hakim Desa)", dalam R. Soepomo, *Pertautan Peradilan Desa Kepada Peradilan Gubernemen*, translation: Rasjad St. Suleman, (Jakarta: Bhratara, 1972), page 5.

indigenous people. Village Courts generally existed in almost the entire archipelago of the territory of indigenous people, while the customary courts were found in the customary law society both in terms of territory and genealogy<sup>27</sup>. For the writer, customary justice as a translation of *inheemsche rechtspraak* implies an atmosphere and a different background from *dorpjustitie* (village courts). Although they were both courts adjudicated among the native people, *inheemsche rechtspraak* not implemented independently by the unity of customary law society, but a court held for indigenous groups (Indonesian) as the consequences of the application of dual legal system based on classification of the population (the European population groups who were subject to European law and the natives who were subject to customary law) and both were controlled by the Dutch Government. As cited by Soepomo,

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<sup>27</sup>Abdurrahman, "Penyelesaian Sengketa Hukum Adat: Antara Peradilan Adat dan Lembaga Adat", *makalah*, tanpa tahun, page 6-9.

*inheemsche rechtspraak* was nothing other than the simplified system of Gubernemen Justice and somewhat less independent, of which it did not apply to the more complicated and formal rules to be implemented at the Justice of Gubernemen. Indigenous Justice recognized in the areas directly ruled by the Dutch government, was also regulated by the government and the government interfere in it as it was usually found in Gubernemen Justice <sup>28</sup>. Unlike *inheemsche rechtspraak* held by the Dutch government as the application of political dualism of law, the existence of village justice is recognized as a respect for the law and local justice system, which existed and developed within the unity of customary law society in Indonesia.

The concept of customary law as intended in the Emergency Act Number 1 of 1951 is different from the concept of customary

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<sup>28</sup> R. Supomo, *Sistem Hukum di Indonesia Sebelum Perang Dunia Ke-II*, (Jakarta: PradnyaParamita, 1972), page 50-51.

justice stipulated in Act Number 21 of 2001. According to Article 51 paragraph (1) of the act, "Justice is the judicial tradition of peace settlement in the customary law society, which has the authority to examine and adjudicate civil disputes and criminal offence among the customary law society concerned". Furthermore, in the following paragraphs asserted that "customary courts are organized in accordance with the customary laws of indigenous people concerned; ... examine and adjudicate civil disputes and criminal offences ... based on the customary law of the customary law society concerned". Thus, the concept of customary justice intended on Act Number 21 of 2001 is closer to the concept of village justice, namely, the justice system held by judges in the small community ( village judges) that at the time of the Dutch East Indies was recognized by Article 3<sup>a</sup> of RO and until now has never been legally abolished.

Based on the explanation above, the use of the term "customary justice" within the meaning or in the sense of the indigenous/native justice as a translation of *inheemsche rechtspraak*, is really inappropriate and no longer relevant, because the special court for indigenous Indonesian no longer needed because there is no more discrimination of people based on their ancestry. In addition, the customary justice as a translation of *inheemsche rechtspraak* had legally been abolished by the enactment of Emergency Act Number 1 of 1951. In order that the term "customary justice" can still be used without causing confusion with the term "customary justice" mentioned in the Emergency Act Number 1 of 1951, then there must be a shared understanding of the concept of customary justice with reference to the concept of customary justice adopted in the Act Number 21 of 2001. This concept can be used as a reference because it represents the

concept of customary justice which still exist and are currently practiced within Indonesian society. This concept is also in accordance with the definition of customary justice proposed by Hedar Laujeng who stated that customary justice is "judicial system which was born, developed and practiced by communities of indigenous people in Indonesia, based on customary law, where the justice is not part of the state judicial system"<sup>29</sup>. By pointing out on the definition that customary justice is the judicial system in the unity of customary law society, therefore it has a constitutional basis, which is recognized under Article 18B Paragraph (2) of the 1945 Constitution. As said by Mahfud MD, that recognition of the unity of customary law society as referred to in Article 18B Paragraph (2) of the 1945 Constitution also implies recognition of the structure and governance which are established by norms of local

customary constitutional law<sup>30</sup>. Customary justice is customary legal institution whose existence is a prerequisite for the existence of the unity of the local indigenous people<sup>31</sup>, thus it is included as the entity that receives the recognition and respect in Article 18B Paragraph (2) of the 1945 Constitution.

As a result, it can be asserted that customary justice concept adopted in this study, which is a system of justice based on customary law, that live within the unity of customary law society, it has the authority to adjudicate customary disputes among residents that occurred in the area of the unity of customary law society concerned. Customary cases, which are settled by customary justice, cover disputes or violations of customary law. The structures, mechanisms and laws that are used

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<sup>30</sup> Moh. Mahfud MD., "Revitalisasi Masyarakat Hukum Adat dalam Kerangka UUD 1945 Menyongsong Globalisasi", Papers on the Seminar of Awig-awig II dengan tema: 'Pemberdayaan Awig-awig Desa Pakraman di Bali dalam Mewujudkan Masyarakat Adat Yang Sejahtera', Bali: 30 September 2010, page 4-6.

<sup>31</sup> See the explanation of Article 9, paragraph (2) of Law No. 18 Year 2004 on Plantation.

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<sup>29</sup> Hedar Laujeng, *op.cit.*, page 1.

by the customary courts in examining and prosecuting a case is based on the local customary law, making it impossible to define uniformly on the thousands of structures and customary justice mechanisms that live within its indigenous people across the region of Indonesia. It needs to be emphasized that what is meant by customary justice here is not part of the state judicial system, nor the continuation or new forms of customary justice as a translation of *inheemsche rechtspraak* known at the colonial time of the Dutch East Indies government and of which had been abolished through the enactment of Emergency Act Number 1 of 1951. Therefore, the present existence of customary justice in the Republic of Indonesia is a fact of legal pluralism<sup>32</sup>, because in the area of public entities customary law, apart from

the formal legal effect under the law of Indonesia, the judicial system based on the diverse customary law are applied as well.

## 2. The Dynamics on Recognition of Customary Justice from Time to Time

Although it is difficult to trace back and to determine when the initial customary justice existed and was practiced as a dispute settlement mechanism among the people of Indonesia, the customary justice is estimated to have been lasted for a very long time, long before the arrival of Europeans, even before the archipelago (cluster of islands now called Indonesia) recognized the kingdom system. The belief that customary justice existed long before the time of the kingdom is reasonable, given the facts that at that time there were community groups who inhabited the territory of Indonesia. Referring to the opinion of Cicero, "*Societas Ibi Ubi jus*" (where there are people, there are laws), it is believed that

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<sup>32</sup> According to John Griffiths, legal pluralism is a condition in which there are more than one legal order applicable in the social area (*sosial field*). See: John Griffiths, "What Is Legal Pluralism?", dalam *Journal of Legal Pluralisme and Unofficial Law Number 24* (Published by the Foundation for the Journal of Legal Pluralism, 1986), page 1.

since the existence of groups of people living in the archipelago, no matter how simple their lives were, since then, there have been local mechanisms of case settlement that occurred in the community concerned<sup>33</sup>. After the era of big kingdoms which ruled the archipelago - both from the golden era of the kingdoms of the Hindu-Buddhist (Sriwijaya, Majapahit) until the time of the Islamic kingdoms (Demak, Mataram, etc.), the customary justice practices probably remained to be applied<sup>34</sup>.

When the people of Europe (the Dutch) came and occupied the Dutch East Indies (Indonesia's region name when it was occupied by the Dutch), they found that in this region there had been a rule of law (*rechtorde*), namely the native rules of law which were different from those in the Dutch rules of law. The Dutch did not negate these native rules of law, nor replaced them with their rules of law, but the Dutch were not subject to those

native Indonesian rules of law. The indigenous people of Indonesia and the Dutch were respectively under their own rules of law. These conditions continued during the time of VOC (*Vereenigde Oost-Indische Compagnie*), Daendels' and Raffles' times, and continued under the Dutch East Indies Government<sup>35</sup>.

The legal recognition of the existence of customary justice can be traced back on the Dutch East Indies government, when the Dutch East Indies government decided that the law recognized the indigenous groups of Dutch East Indies had their own applicable law and their own judicial system, whereas the populations of European descendants were subject to the European legal and judicial systems. At first, there were dynamics (controversies) on the ideas of the politics of law between the pros and the cons toward the ideas of legal unification and legal

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<sup>33</sup> Hedar Laujeng, *op.cit.*, page 1

<sup>34</sup> Hilman Hadikusuma, *op.cit.*, page 9

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<sup>35</sup> Utrecht/Moh. Saleh Djindang, *Pengantar dalam Hukum Indonesia*, tenth impression, (Jakarta: PT Ichtiar Baru-Sinar Harapan, 1983), page 186.

institutions for the entire population in the Dutch East Indies. The parties of pro-codification and unification of the law led by a powerful group of liberal influence in colonial politics in the nineteenth century demanded codification and unification's enactment of the law in the colonies, while the defenders of customary law were against those ideas. The idea of codifying the law began to be implemented in the Dutch East Indies on 30 April 1847 by the enactment of the Code of Civil Law and the Commercial Law through *Gazette (Stb.)* 1847 Number 23. By the application of the Civil Law and Commercial Law for the European group in the Dutch East Indies, the works of codification to establish the supremacy of law in the colonies were considered accomplished. However, there were other issues that have not been completed, the matters of unification of law which comprised not only substantive law but also formal procedures along

with their judicial systems<sup>36</sup>. In addition to desire the unification of substantive law, the liberals also sought for unification of the judicial system in the Dutch East Indies. They argued that codification was believed to provide certainty of rights (by law) to the individual members of society, while unification was believed to materialize ideas that treat the entire population of the country with the attitude and acts of equal treatment, non-discrimination, and to regard each person as equal before the law. They were prejudiced that the practice of legal dualism in colonial land was a discriminatory act that caused groups of non-European people did not obtain legal protection. By invoking the same law (in this case European law) against the Europeans and people of non-European, the exponents of the ideology of liberalism believed that

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<sup>36</sup>Soetandyo Wignjosoebroto, *Dari Hukum Kolonial Ke Hukum Nasional, Dinamika Sosial-Politik dalam Perkembangan Hukum di Indonesia*, (Jakarta: PT RajaGrafindo Persada, 1995), page 47. See also: Hilman Hadikusuma, *op.cit.*, page 21.



the interests of indigenous people and those who were equalized with them would be more likely protected from arbitrary colonial administrators, namely, the kings and chiefs of the indigenous people<sup>37</sup>. In their radical point of view, the liberals also believed that when the legal interests of indigenous people would be protected under the jurisdiction of the European courts, the indigenous people would be able to enjoy the explicit rights of the European people and therefore they also would gain definite protections under European law.

On the basis of the above beliefs, the liberals in the political power of the Netherlands then urged the implementation of codification and unification of the law in the colonies as part of their efforts to bring into reality the ideals that they believed to have a universal value<sup>38</sup>. However, the ideals of the legal unification proved

very difficult to be realized due to the persistent practices of legal dualism in the Dutch East Indies for many years, and also it had oppositions from the defenders of the customary law. Faced with these conditions, the Dutch East Indies government finally chose a compromise, namely, allowing the natives to stick with its own legal system (customary law), and the population of the European group applied the European law. As a result, the regulations of the above codification were applied only to the populations of the European group, not including the customary law. For the needs of the indigenous population, they applied what was specified in Article 11 *Algemene Bepalingen Wetgeving van voor Indonesia*, commonly called *Algemene Bepalingen* (abbreviated to AB) , namely the General Provisions of the Legislation in Indonesia. Regulations issued on 30 April 1847 were in the form of Decree of King (*Koninklijk Besluit*) of which had confirmed the practice of

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<sup>37</sup> Soetandyo Wignjosebroto, *op.cit.*, page 39

<sup>38</sup> Soetandyo Wignjosebroto, *op.cit.*, page 37.

legal dualism in the Dutch East Indies. The Political adoption on the legal dualism can be found in three articles, namely:

1. Article 5 states that the populations of the Dutch East Indies were divided into European groups (and those equivalent to them) and the indigenous groups (and those who were equalized with them);
2. Article 9 states that the Civil Codes and the Commercial Law (in force in the Dutch East Indies) would only apply to European groups and those equivalent to them;
3. Article 11 states that for the indigenous populations, the judge would apply the law of religious institutions and habits of the natives themselves, as long as those laws, institutions, and practices were not in contrary to the principles of decency and justice which universally recognized and also if the

natives had been charged with the European rule of law or if the indigenous people concerned had subjected themselves to the law of the European<sup>39</sup>.

In a further development, as a result of changes in the prevailing system of government in the Netherlands, the rules which regulated the colony were no longer set solely by the kings with *Koninklijk Besluit*, but must go through regulatory mechanisms at the level of parliament. The basic rules made jointly by the king and parliament to regulate colonial governments were *Regeling Reglement (RR)*, which enacted in the Year of 1854. *Regeling Reglement* was a legislation enacted by *Stb.* Number 2 of 1855. Further *Regeling Reglement* was referred to as the Constitution of the Dutch Colonial Government. In connection with the change of the rule of law of the Dutch East Indies, the substance of Article 11 AB was then

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<sup>39</sup> Soetandyo Wignjosebroto, *op.cit.*, page 54.

inserted into the wordings of Article 75 R.R. 1854. In 1920, the wordings of the old Article 75 R.R. (1854) had been changed into a new Article 75 R.R. (1920), in which the limitations of customary law application in the wording or phrase of "as long as the customary law is not in contrary to the recognized principles of common decency and justice" was not mentioned anymore, but the customary law may be deviated if desired by: (1) the public interest, (2) the interests of social groups of Indonesia <sup>40</sup>. The RR. of 1920 was valid until 1925, i.e. until the time of enactment of *Indische Staatrregeling (IS)*, namely the Dutch East Indies State Regulation, as the renewal of *Regeling Reglement (RR.)* and it was declared effective as of January 1, 1926 (*Stb.* No. 415 Year 1925). With this change, the wordings of RR Article 75 (new) inserted into Article 131 *IS*. The changes brought to the wordings of *IS* Article 75 RR. (New) was not much and did not change

the recognition of customary law and the policy of legal dualism of the Dutch East Indies authorities.

The Legal dualism system adopted in the Dutch East Indies' politics of law resulted in dualistic judicial system as well. In fact, the structure of colonial justice organizations persisted in a pattern for a separation of justice between European population groups and indigenous groups or those who were equalized with them. What happened then was the takeover of control or cooptation over the existing indigenous judicial institutions, and then they organized them as part of the colonial system of justice with the authority to adjudicate matters of indigenous people, and made decisions on behalf of the King (The Netherlands). Along with the implementation of *Wetgeving van voor Algemene Bepalingen Indonesia (AB)*, which adhered to the politics of legal dualism, dualism of judicial system was also strengthened in 1847 with the

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<sup>40</sup> Mahadi, *op.cit.*, page 16.

regulations, known as *De Regterlijke Organisatie Reglement op en Het beleid Der Justitie*, often simply called *Reglement op de Rechterlijke Organisatie* (abbreviated to: *RO*). This regulation was announced with a *Koninklijk Besluit* dated May 16, 1847 (*Stb.Mor* No. 23 of 1847) <sup>41</sup>.

It was assigned In *RO*. a number of courts to adjudicate law cases occurring among Europeans people or the equivalent, and other courts to adjudicate law cases occurring among the natives or the equivalent. Justice for the European group was called *gouvernements-rechtspraak* (Gubernemen justice), while justice for the indigenous or native groups was called *inheemsche rechtspraak* (which was then translated into *peradilan asli* (the native justice), *peradilan pribumi* (the indigenous justice), or *peradilan adat* (the customary justice).

According to Hilman Hadikusuma<sup>42</sup> and Mahadi <sup>43</sup>, the

courts or justice which were applied after 1847, are as follows.

1. *Gouvernements-rechtspraak* (Gubernemen Courts) was justice conducted by the government judge on behalf of the King / Queen of the Netherlands by the European legal order for the entire area of the Dutch East Indies.
2. *Inheemsche rechtspraak* was justice conducted by the European judges and the Indonesian judges, not on behalf of the king / queen and nor based on European legal order, but with the customary law system determined by the Resident with the approval of the Director of Justice at Batavia<sup>44</sup>. Mahadi shows the legal basis of *gouvernements-rechtspraak* and *inheemsche rechtspraak*, namely the Article of 74 *RR./ 130 IS* which states that "by no means the natives are

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<sup>41</sup> Soetandyo Wignjosoebroto, *op.cit.*, page 61.

<sup>42</sup> Hilman Hadikusuma, *op.cit.*, page 37.

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<sup>43</sup> Mahadi, *op.cit.*, page 28.

<sup>44</sup> Hilman Hadikusuma, *op.cit.*, page 23

not allowed to have their own courts, in the entire area of Indonesia justice was given on behalf of the King. Wherever the natives are allowed to have justice on their own there must be native justice (*inheemsche rechtspraak*) "<sup>45</sup>.

3. *Zelfbestuur rechtspraak* (the Autonomous Justice or the Court of the King) was justice conducted by the autonomous Judges based on the autonomous laws which content imitated the indigenous or customary justice. In Java there were three autonomous justices, namely autonomous justice of Surakarta, Mangkunegaran, and Yogyakarta, which generally had the authority of adjudication limited to the royal blood relatives or those related by royal marriage until the fourth cousin as well

as to self-government high officials. Similarly, the autonomous justice outside Java and Madura, the authority of adjudication was limited to its own people, in the limited sense that it adjudicated the legal matters of the defendants of people of autonomous regions proposed by any plaintiffs for civil and minor criminal cases<sup>46</sup>.

4. *Godsdienstige Rechtspraak* (religion court) was justice carried out by the Judges of Religion court or the native Judges or Judges of Gubernemen to resolve matters related to Islamic Law. The legal basis of these religion courts was Article 134 paragraph (2) of *Indiesche Staatsregeling (IS)* which states: "... but the civil lawsuit between Muslims, and even then if required by the customary law examined by

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<sup>45</sup> Mahadi, *op.cit.*, page 30

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<sup>46</sup> Hilman Hadikusuma, *op.cit.*, page 26.

the religion judge, as long as it is not specified otherwise on the ordinance." This stipulation means that litigants shall be fellow Muslims and according to customary law the cases should be examined by a religion judge. Thus, if the local indigenous people wanted the cases to be resolved by a judge of religion, then the religion courts may be established in those regions.<sup>47</sup>

5. *Dorpjustitie* (Village Courts) was justice carried out by the judges called the Village Judges or the Customary Judges both in Gubernemen justice, indigenous / customary justice, and autonomous justice outside Java and Madura, with jurisdiction over minor cases, namely the customary or the affairs of the village. Although the

village justice had long been prevailed in the lives of people in rural areas, but the Dutch government had just admitted it in 1935, when the Article 3a *RO.* was inserted to *Stb.* Mor 1935 No. 102.

The condition of court institutions' dualism continued to the time of the Japanese occupation in Indonesia. Although through the Act Number 14 Year 1942, which later on amended by Act Number 34 Year 1942, The Japanese Occupation Government had simplified the system of justice in which the distinction between Gubernemen justice and justice for the indigenous people was abolished, but the practices of customary justice continued to exist. In Sumatra, the customary justice courts were obviously declared to be valid and preserved by Article 1 of the Law on Judges and Court Rules (*Sjihososjiki-rei*) stipulated in *Tomi-Seirei-otsu*

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<sup>47</sup> Hilman Hadikusuma, *op.cit.*, page 22.

Number 40 dated December 1, 1943

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The unification of justice institutions desired since the Dutch colonial times had actually been achieved at the time of independence, when the Emergency Act Number 1 of 1951 was issued. The Legislation whose full title was "The Emergency Measures to Unitary Structure of Power and Administrative Civil Courts" principally contains 4 main points, namely:

- (1) The abolition of some judicial tribunals that no longer correspond to the composition of a unitary state;
- (2) The gradual abolition of autonomous courts in certain areas and all customary courts;
- (3) Maintenance of religion and village justice courts, as long as the courts were independent or apart from the customary courts;
- (4) The establishment of district courts and attorney in places

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<sup>48</sup> Sudikno Mertokusumo, *op.cit.*, page 14-23

where *landrgerecht* was abolished<sup>49</sup>.

Especially with regard to the abolition of the customary justice, it was defined in Article 1 (2) of the Emergency Act Number 1 of 1951, which states as follows: "it will be gradually determined by the Minister of Justice, the abolition of all Customary Courts (*Inheemse rechtspraak in rechtstreeksbestuurd gebied*) except for the religion courts, if this justice according to the applicable law is a separate part of the customary justice ". It is known from the Explanation of Emergency Act Number 1 of 1951 the judicial consideration of the elimination of customary justice, namely because (1) customary justice did not qualify for the judicial institution as required by the Provisional Constitution (UUDS), and (2) it was no longer desired by the people.<sup>50</sup> As the implementation of the Emergency Act, the Government (Ministry of Justice) then issued a

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<sup>49</sup> Sudikno Mertokusumo, *op.cit.*, page 92.

<sup>50</sup> See the General Explanation of Emergency Act Number 1 of 1951.

series of regulations to abolish the customary justice. The regulations issued in the period of 1952-1954, are as follows.

- (1) The Decree of the Minister of Justice dated March 19, 1952 Number JS04/08/16 (TLN. 231) which abolished the autonomous courts throughout Bali.
- (2) The Decree of the Minister of Justice dated August 21, 1952 Number JB4/3/17 (TLN 276) which abolished the autonomous courts and customary courts throughout Sulawesi.
- (3) The Decree of the Minister of Justice on 30 September 1953 JB4/4/7 Number (TLN 462) which abolished customary courts throughout Lombok;
- (4) The Decree of the Minister of Justice dated May 19, 1954 Number JB04/02/20 (TLN. 603) which abolished the autonomous courts throughout the regions of

Sumbawa, Sumba, and Flores.

- (5) The Decree of the Minister of Justice dated June 21, 1954 Number JB4/3/2 (TLN. 641) j0 of the Decree of Ministry of Justice on August 18, 1954 Number JB4/4/20 (TLN.642) which abolished customary courts and autonomous courts throughout Borneo<sup>51</sup>.

Although there were many customary courts that had not been abolished until 1955 - as occurred in the customary courts in Bengkulu and Palembang <sup>52</sup> – but the measures of the Minister of Justice of abolishing autonomous and customary courts can be seen as an important milestone in the history of the judiciary in Indonesia. With these measures, the political will to carry out the political unification of the judicial system as the politics of law of the judiciary have actually been implemented in a real action

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<sup>51</sup> Sudikno Mertokusumo, *op.cit.*, page 94.

<sup>52</sup> Sudikno Mertokusumo, *op.cit.*, page 125, 134.



by abolishing the presence of autonomous and customary courts in Indonesia, where the judicial duties of autonomous and customary courts were further implemented by the District Courts. Although the abolition of the autonomous and the customary courts were done gradually, but the power of Emergency Act Number 1 of 1951 guaranteed that there would be no official judiciary should be held but the ones organized by the state. What had been the standpoints of the legislators of the Emergency Act Number 1 of 1951 had actually become the standpoints of the Republic of Indonesia since 1948<sup>53</sup>, when the Indonesian Government issued Law Number 19 of 1948 which had no effect.

The abolition of the customary justice did not undermine the existence of the customary justice in its new form, namely the village justice (*Dorpjustitie*). The determination of the continuation of

village justice can be seen in Article 1 paragraph (3) of Emergency Act Number 1 of 1951 which states that "the provisions mentioned in the paragraph (1) absolutely do not reduce the rights which had been granted to the judges to cases' settlement in the villages as referred to in Article 3a of *Rechterlijke Organisatie*". Thus, the customary justice abolished by the enactment of the Emergency Act was the customary justice of the Dutch Indies era known as *inheemsche rechtsspraak*, while the authority or the power of the customary justice made by the authorities/chiefs of the unity of customary law society was still continued.

In its further development, the matters of justice were governed by the laws of judiciary, from Act Number 19 of 1964, Act Number 14 of 1970 as it was amended by Act Number 35 of 1999, Act Number 4 of 2004 and the latest one by Act Number 48 of 2009. The same as the approach or the ideas of Emergency Act Number

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<sup>53</sup> Daniel S. Lev, "Judicial Unification in Post-Kolonial Indonesia", *Indonesia*, Th. XVI (1973), No.1, page 1-37.

1 of 1951, the series of laws and judiciary that were ever applied and those being applied principally also embrace the politics of legal unification on the justice institutions, by asserting that all the courts or justice exist in the Republic of Indonesia are state justice, but with the certain dynamics in its flexibility. The Act or legislation that firmly embraces the principle of "the state justice as the only judicial institution in Indonesia" and precludes the validity of customary justice was Act Number 14 of 1970. The principle was then made less strict by the enactment of Act Number 4 of 2004 to replace the Act of Judiciary of 1970. In the Act of 2004 on Judiciary, the principle of state justice as the only judicial institution in the Republic of Indonesia is still embraced, as stipulated in Article 3 paragraph (1) which states that "All courts or justice in the entire territory of the Republic of Indonesia are state justice and regulated by legislation". However, the legislation also still

recognizes the out- of- court settlement, as stated in the explanation of Article 3, paragraph (1) which elaborately states that "this provision does not preclude settlement performed outside the state justice through peace or arbitration. "the terms used in the Explanation of Article 3 paragraph (1) is the settlement of the "case", which can be interpreted as disputes (civil cases) and the legal offence (a criminal offence). Consequently, the Judiciary Act of 2004 still provides opportunities and acknowledge the practices of out- of- court settlements, of which can be done through the customary justice. Although the recognition still contains legal weaknesses because it is only outlined in the explanation of the paragraph, yet the recognition can already be seen as progress for the existence and practices of customary justice, which so far has been *de facto* serves as the out- of- court settlements. Seen from the perspective of legal politics theory,

the recognition of the Principles of Judiciary Act of 2004 on the enactment of alternative opportunities of out-of- state court settlements can be regarded as the recognition of legal pluralism in the legal politics of judiciary<sup>54</sup>.

The opportunities for the recognition of customary justice were again precluded after the enactment of Act Number 42 of 2009. Although the new law is specifically accommodate the out – of- court settlements in a separate article, but the settlements recognized by the law are merely alternative dispute resolution and arbitration. The term used is "dispute" instead of "case" as used in the Judiciary Act of 2004, therefore it does not correspond with the comprehensive concept of customary justice, which is entitled to settle the customary cases, both

civil and criminal ones. For this reason, it can be said that there is no recognition of the customary justice under the law governing the current judiciary.

Interestingly, the existence of the customary justice, in fact, is recognized in the Act Number 21 Year 2001 on Special Autonomy for Papua Province, a law that applies only locally in Papua, one of provinces in the eastern part of Indonesia that was granted special autonomy. The act or law itself is derived from Article 18 of 1945 constitution, which regulates the local governments. The Recognition of customary justice explicitly stated in Article 50 of the act, which states:

(1) The judiciary in the province of Papua is implemented by the Courts/ Judicial Institutions in accordance with the legislation.

(2) In addition to the judiciary referred to in paragraph (1), the existence of customary justice in the

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<sup>54</sup> Marhaendra Wija Atmaja mentions the political elements of legal pluralism as a legal framework to interpret the politics of law in the 1945 Constitution, of which the politics of legal pluralism is the statement of state's political will to recognize the diversity of the applicable legal orders , along with their respective community. See: Gede Marhaendra Wija Atmaja, *op.cit.*, page 36.

particular indigenous people is recognized.

From the above description, we can conclude three things. Firstly, that the current applicable law governing the judiciary does not acknowledge the existence of customary justice; Secondly, there are inconsistencies in the laws of the Republic of Indonesia at the level of act/legislation which is related to the recognition of customary justice. The customary justice is recognized in the locally applicable law, but on the contrary, the customary justice does not achieve recognition in the nationally applicable law of judiciary. Thirdly, as a result, the political direction of judicial recognition of customary law as mandated in the 1945 constitution (UUD 1945) has not been consistently implemented in the real application of the laws of the Republic of Indonesia at the level of legislation.

### 3. The Direction of Recognition of Customary Justice in the Future

The recognition of customary justice in the Special Autonomy Law for Papua Province is a particular dynamics in the legislation of the Republic of Indonesia which gives hope that the future existence of customary justice will be recognized nationally. The national legal political pendulum seems to swing to the explicit recognition of the customary justice within its indigenous people which are still adopted and spread all over Indonesia. The tendencies can be seen from the preparation of bills on the unity of customary law society that are already in the national legislation program (Prolegnas). In the two bills on the unity of customary law society which are being prepared by two different state's official bodies, namely the Indonesian Regional Representatives Council (DPD) and the House of Representatives of the Republic of Indonesia (DPR RI), the

existence of customary justice is already accommodated in the draft of their articles. In the drafts of the bill prepared by the Ad. Hoc. I of the Indonesian Regional Representatives Council in 2009, the recognition of customary justice is accommodated in the drafts of Article 7 and Article 8 where it is conceptualized that the customary justice as part of the customary institutions given the authority to adjudicate all cases that occurred and committed by members of indigenous peoples at their indigenous territories concerned<sup>55</sup>. Meanwhile, in the drafts of the bill prepared in 2012 by the Legislative Council of the House of Representatives of the Republic of Indonesia, the recognition of customary justice is accommodated in the draft of Article 18 which states that " the unity of customary law society have the right to hold the customary justice system in

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<sup>55</sup> The Ad. Hoc. I Committee of DPD RI, "Drafts of the Bill on the Protection of Indigenous Peoples",; The Test on Materias' Validityl , (the Council of Regional Representatives of the Republic of Indonesia, 2009), page 5.

resolving disputes relating to the customary rights and the violation of customary law " <sup>56</sup>.

The two bills above are prepared in the same way as an elaboration of politics of law of the local governments, particularly those stipulated in Article 18B Paragraph (2) of the 1945 Constitution. Although the concept of customary justice as outlined in the bills still need to be scrutinized, but the efforts made by the Regional Representative Council and the House of Representatives deserve appreciation. The opportunities to regulate the justice issues in legislations beyond the law of judiciary are made possible by the constitution, based on Article 24 paragraph (3) of the 1945 Constitution. The article says that "other bodies whose function related to the judiciary are regulated

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<sup>56</sup> Bill No. ... Year ... on the Recognition and Protection of the Rights of Customary Law Community", the Materials of the study tour in purpose of Obtaining Input Toward the Drafting of Bill on the Recognition and Protection of the Rights of the customary law community of the Commission III of DPR RI, in the Regional Office of Ministry of Justice and Human Rights of Bali , October 4, 2012, page 5

by the law". The phrase "regulated by the law" implies that the regulation of customary justice should not necessarily regulated by the law that specifically regulates the justice (judiciary), but it can be regulated by other sectoral laws<sup>57</sup>, such as the laws governing the unity of customary law society.

However, it is important to bear in mind that customary justice is a judicial system that based on the customary law, which also carries out the functions of the judiciary. From the perspective above, ideally in the future, the issues of customary justice should also be regulated in the law on judiciary, therefore it results in consistency between the laws governing the justice with other laws that also regulate customary justice. In order to enable the politics of law of judiciary to

accommodate the recognition of customary justice, then the revision of Act Number 42 of 2009 on Judiciary is relevant to be carried out.

## **CONCLUSIONS**

It can be concluded from the historical study that the recognition of customary justice in politics of law of judiciary in Indonesia experienced the dynamics according to the political, legal, and governmental developments. This is because of the facts that the politics of law - including the politics of law of judiciary - are affected by the ongoing political configuration. In the colonial time of the Dutch East Indies, the existence of customary justice was formally recognized by the colonial government along with the adoption of politics of law dualism at that time. The legal dualism system adopted in the Dutch East Indies' legal policy resulted in dualistic judicial system as well where for the European population group applied European

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<sup>57</sup> See the opinion of the Constitutional Court of the Republic of Indonesia concerning the meaning of the phrase "regulated by law" in the Decision of the Constitutional Court of the Republic of Indonesia, Decision on Case No. 007/PUU-III/2005 in the Case Testing of Act of the Republic of Indonesia Number 40 Year 2004 on the National Social Security System against the 1945 Constitution of the Republic of Indonesia . page 268

law and the European judicial system, while for the indigenous Indonesian population group applied the customary law and the customary judicial system. The legislations of the Dutch East Indies recognized two forms of customary justice, namely the indigenous justice (*inheemsche rechtspraak*) and the village justice (*dorpjustitie*) with their respective legal basis. When the Japanese Occupation Government controlled Indonesia (1942-1945), the existence of customary justice was still recognized, despite the Japanese rulers at that time abolished the distinction between justice for the population of the European group and the ones for the indigenous groups.

The dynamics of the government recognition on customary justice came after Indonesia's independence. Once the declaration of Indonesian independence was proclaimed on August 17, 1945 and then the next day was applied the constitution for

an independent state of Indonesia (1945 Constitution), the condition of dualism of justice institutions was maintained that the position of customary justice was still recognized by the government. In 1951 was issued the emergency act intended to hold the unification of courts' structure, namely the Emergency Act Number 1 of 1951. Under this law, the customary justice (*inheemsche rechtspraak*) was gradually abolished by the government, but the existence of the village justice (*dorpjustitie*) was still recognized.

Since 1970, the issues of justice were set in the law of judicial power, which has undergone several times of amendment or replacement. The series of laws and judiciary ever applied or being applied principally embrace politics of unification of justice institutions by asserting that all justice or courts in the Republic of Indonesia are state justice. The Act or legislation that firmly embraces the principle of "the state justice as the only justice

in Indonesia" and precludes the application of customary justice was Act Number 14 of 1970. The principle was then made less strict by the enactment of Act Number 4 of 2004, as it still provides opportunities and acknowledge the practices of out- of- court settlements, so that the customary justice has the opportunity to remain prevailing. The opportunities for the recognition of customary justice were again precluded after the enactment of Act Number 42 of 2009. Although the new law is specifically accommodate the out – of- court settlements (alternative dispute settlement and arbitration), but the concept is different from the comprehensive customary justice. Interestingly, the existence of the customary justice, in fact, is recognized in the Act Number 21 Year 2001 on Special Autonomy for Papua Province, therefore, there are currently inconsistencies in the laws of the Republic of Indonesia which are related to the recognition of customary justice.

In the future, the politics of national law seems to appreciate and accommodate the recognition of customary justice through laws that regulate the unity of indigenous peoples, not through the law of judicial power. The tendencies can be seen from the preparation of bills on the unity of customary law society that are already in the national legislation program (Prolegnas) of the House of Representatives of the Republic of Indonesia (DPR RI) in which the existence of customary justice is acknowledged.

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